STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

SBC Communications, Inc.,	:	
SBC Delaware Inc.	:	
Ameritech Corporation,	:	
Illinois Bell Telephone Company	:	
d/b/a Ameritech Illinois, and	:	
Ameritech Illinois Metro, Inc.	:	
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	:	98-0555
Joint Application for approval of the	:	
reorganization of Illinois Bell Telephone	:	
Company d/b/a Ameritech Illinois Metro, Inc.	:	
in accordance with Section 7-204 of the	:	
Public Utilities Act and for all other appropriate	:	
relief.	:	

BRIEF ON REOPENING OF 21ST CENTURY TELECOM OF ILLINOIS, INC.

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Dated: July 28, 1999

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BRIEF ON REOPENING OF 21ST CENTURY TELECOM OF ILLINOIS, INC.

Pursuant to 83 Illinois Administrative Code Part 200, 21st Century Telecom of Illinois, Inc. ("21st Century") hereby submits its Brief on Reopening in this proceeding.

INTRODUCTION

Pursuant to the June 4, 1999 direction by the Illinois Commerce Commission, the record in this proceeding was reopened and the Joint Applicants moved to file an amended Application for the merger. The record in this case has been described as "appallingly vague" and has led parties to suggest that without further evidence, the Hearing Examiner's Proposed Order ("HEPO") from the first phase of this docket is legally and factually unsupported. The HEPO concluded that Southwestern Bell Telephone Company's ("SBC" or "the Company") merger with

Ameritech Illinois could be approved under both IL Rev. Stat. 220 § 5/7-204 of the Public Utilities Act ("the Act") and the Department of Justice Horizontal Merger Guidelines ("DOJ Merger Guidelines"). A majority of the Commission, however, ruled that additional information was necessary to supplement the record and ensure a more solid basis to the ultimate determination in this case.

In a June 4, 1999 letter to the Hearing Examiners, Chairman Mathias stated that ". . . the Public Utilities Act requires the Commission to reach a number of determinations regarding such issues as the proposed reorganization's effects upon competition, allocation of merger costs and savings and possible conditions to the merger." The Chairman further stated ". . . I, as well as Commissioners Kretschmer and Harvill, am troubled by the record regarding the reorganizations effects upon competition."[1]

Thus, it was suggested to the Joint Applicants that further testimony should be submitted on particular aspects of the merger, and intervenors were invited to respond in the reopened record.[2] In response to the reopened docket, 21st Century's Manager of Regulatory Services, Kristen M. Smoot addressed the Commission's questions and detailed Ameritech's operational problems resulting in deficiencies in such areas as service order processing, meeting timely collocation commitments and generally responding to legal requirements for provisioning services in parity with similar commitments experienced by Ameritech's own affiliates.

The evidence in this docket demonstrates that SBC had plans to enter Illinois markets, which was also the finding of the HEPO. Further, SBC, as a potential entrant in the state,

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1 Chairman Mathias's Letter to the Hearing Examiners Mark Goldstein and Eve Moran, June 4, 1999.

2 Id., and Chairman Mathias's Letter to Hearing Examiners Mark Goldstein and Eve Moran, June 15, 1999.

severely hampers the Section 7-204 statutory basis of Joint Applicants' case because a merger of potential rivals is illegal. As the record indicates, some of SBC's plans were under consideration right up to the point of the merger. This finding is appropriate given the evidence of the Company's own pronouncements regarding entry and provides glaring contrast to SBC's attempts at denying its pre-merger entry strategy. However, even assuming that no evidence of SBC's intent to enter the Illinois market was ever divulged on the record, the Joint Application still fails under the DOJ Merger Guidelines.

The Joint Applicants' assertion that merger will not harm competition is untenable, both as a matter of record evidence and under a common understanding of the meaning of real competition. Moreover, several of the commitments made by Joint Applicants attempt to mollify the parties and yet fail to address the heart of the real competitive concerns evidenced herein. For instance, the three year timetable under which Joint Applicants would commit to establishing performance measures – measures that fail to address some of the real operational problems experienced by 21st Century – ensures that Joint Applicants will benefit from additional delays in interconnecting CLEC networks. It has been three years since the passage of the federal Telecommunications Act ("FTA"), and Joint Applicants' request for additional time rings hollow. This is especially the case here, where 21st Century has documented current interconnection problems with Ameritech, and other carriers have testified to similar types of problems in California and Texas regarding the extent to which these ILECs will go to delay nascent competitors. Illinois law mandates that the ICC reduce the role of government regulation of telecommunications.[3] 21st Century concurs with the statements of the Illinois Commerce

[3] See e.g., IL Rev Stat 220 Sec. 5/13-103(b).

Commission Staff ("Staff") and other parties that the establishment of conditions on the approval of this merger would not cure the numerous defects in the Joint Application.[4] It would be incongruous for this Commission to propose more regulation just as this industry is beginning its transition towards a more competitive environment. ICC Exhibit 9.01 (Dr. Hunt) at 3-4.

The Joint Applicants admit that significant aspects of their National Local commitments will not, and can not, take effect until SBC receives Section 271 approval from the FCC and the State of Illinois. The Joint Applicants must rely on a business plan that incorporates the use of third party entities or affiliates to enter the interLATA markets. However, because Commission approval of those plans is at least a year or more away, the benefits of the touted National Local strategy will not even occur in a time frame meaningful for quick determination by this Commission. If the Commission decides to approve some form of merger upon imposition of proper conditions, then, at the very least, it should impose both the conditions outlined in Section II (B) of 21st Century's Brief on Reopening and the statutory 271 obligations addressed by the parties in this case.

ARGUMENT

I. Applicable Legal Standards

The Joint Application filed by SBC and Ameritech, including the additional commitments made pursuant to the reopened docket, continues to violate Section 7-204 the Act. Section 7-204 (b)(7) of the Act applies to the proposed reorganization of SBC and Ameritech. Section 7-204 (b)(7) requires that the proposed reorganization is not likely to result in any adverse rate impacts

4 ICC Ex. 1.0 (Marshall) at 9.

on retail customers. The phrase "any adverse rate impacts on retail customers" is extremely broad. First, the language does not limit the examination to the retail customers of the reorganizing utility. Thus, the Commission must deny approval of the reorganization if it determines that the proposed reorganization is likely to result in any adverse rate impacts on the retail customers of other LECs who are currently competing with Ameritech or are expected to compete with it in the near future. More specifically, to the extent the reorganization slows the introduction of competition and its accompanying price and services competition, or enables SBC to extract higher costs from competitive LECs, the Commission must deny the application. Second, the language does not limit the examination to retail customers as a whole. If any class of retail customers suffers adverse rate impacts, the application must be denied. Third, the phrase "any adverse rate impacts" does not limit the examination to noncompetitive rates. If any rates are adversely affected, even those for competitive services, the application must be denied. Fourth, the rate impact need not be an increase. To the extent that the proposed merger would allow rates to stay the same, instead of causing them to drop, or to the extent that rates would fall more slowly than they would have otherwise fallen, the application must be denied.

It should be noted that SBC seems to focus a great deal of its argument on market concentration and the DOJ Merger Guidelines as the basis for an appropriate state commission review.[5] SBC's focus is misplaced given the importance of Illinois' regulatory review of the merger. As the record indicates, the FCC has previously acknowledged the role states must play in reviewing these types of mergers. In the Bell Atlantic/Nynex merger, the FCC stated:

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[5] For a thorough review of this subject, see ICC Ex. 4.01, 4.02 (Graves), ICC Ex. 9.01 (Hunt) and Sprint Ex. 2.1(Woodbury).

> The proposed transfer was reviewed by the United States Department of Justice ("DOJ") pursuant to the Hart-Scott-Rodino ("HSR") amendment to the Clayton Act. n38 DOJ completed its review without taking action against the proposed merger. On April 24, 1997, [*1998] DOJ issued a press release stating that the proposed merger does not violate the antitrust laws. n39 <u>We do not regard the DOJ action as resolving the issues before the Commission, which involve consideration of the public interest.</u>

Bell Atlantic/Nynex Order, 12 FCC Rcd at 24 (emphasis added).

Section 7-204(f) of the Act imposes certain legal burdens on the proposed merger which must be satisfied. It provides the Commission with broad discretion to protect the interests of Ameritech's customers. The Act allows the Commission to use its judgment and provides that the terms, conditions or requirements must be designed to protect the interests of Ameritech and its customers. It should be noted, however, that the imposition of terms and conditions or requirements is not a substitute for the findings under Section 7-204(b). In other words, the Commission must first find that Section 7-204 standards are met. Only then can it determine if terms, conditions, or requirements should be imposed.

Additionally, when the Commission considers the significant premium SBC is paying to acquire Ameritech, SBC's past record for increasing service prices[6] and how SBC might use Ameritech revenues for out-of-region competitive ventures, a Section 7-204(b)(7) finding that the proposed acquisition is not likely to result in any adverse rate impacts on retail customers is seriously called into question. (220 ILCS 5/7-204(b)(7)).

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[6] See GCI Ex.1.0 (Selwyn), and Nextlink Ex.1.0 (Gonzalez) at 13). *Report of the Office of Ratepayers Advocate of the California Public Utilities Commission*, ("Cal. P.U.C." June 4, 1998) impact of SBC's acquisition of Pacific Bell Telephone Company ("Pacific Bell") reflects higher prices, degradation in service quality and less competition.

21st Century believes that any conditions sufficient for bringing the proposed merger into compliance with the requirements in Section 7-204(b)(6) must be carefully designed prior to Commission approval of the merger.

II. Ameritech's Operational Impediments to Competition From 21st Century

In its June 4, 1999 and June 15, 1999 letters to the hearing examiners, Chairmen Mathias and a majority of the Commission members specifically requested information regarding the effect of the merger on competition, including various specifics on how CLECs would be impacted by the merger as they interconnect their networks with Ameritech.

21st Century provided responses to several areas of the Commission's questions on reopening. Notably, 21st Century's testimony included how Ameritech continually failed to follow up on requests to make certain type of loop ordering available through electronic means, meet collocation schedules, or simply provide some explanation to 21st Century when an important function like the SS7 / SCP network serving in excess of 100,000 customers, inexplicably crashed. Ameritech's witness, Terry Appenzeller, in Rebuttal Testimony on Re-opening complained of the relevancy of these matters and dismissed them as "miscellaneous CLEC issues." As 21st Century demonstrated, the current operational environment evidences problem areas with respect to Ameritech's degree of cooperation with CLECs and is relevant to the Commissioners' questions because they give specific examples of: 1) the lack of parity that CLECs often experience when compared to the treatment that Ameritech's retail customers receive, and 2) the lack of urgency with which many of Ameritech's policies needlessly and unjustifiably delay CLECs and their customers.

Furthermore, these “miscellaneous CLEC” issues are not isolated to individual CLECs. Not only did 21st Century raise problematic operational issues, but other carriers such as McLeod USA, Global Com, Sprint and Accelerated Connections, Inc (“ACI”) demonstrated a similar frustration with Ameritech’s persistent interference with the orderly operations of CLECs. Each issue that Ms. Smoot addresses illustrates a need for dramatic improvement by Ameritech in order to ensure that CLECs achieve parity with the ILEC’s own treatment of its retail customers. While these “miscellaneous issues” are addressed in the first instance between CLECs and their Ameritech Service Managers, they often are not adequately resolved, and serve to demonstrate the need for strict performance measures with meaningful enforceable policies and incident based penalties sufficient to ensure ILEC compliance.

A. Commission’s Question Regarding Operations Support Systems: Attachment A

The Commission sought comment regarding the enforcement of the Joint Applicant’s commitments to Operations Support Systems (“OSS”) in its June 15th list of questions to the parties. Question A (4)(c), enforcement and third party testing, specifically addressed the issue of whether third party testing should be required to determine whether the Joint Applicants are in compliance with their commitments. It is 21st Century's belief that Ameritech's past actions illustrate the need for third party testing. While Ameritech states that it has "every incentive" to provide appropriate OSS functionality, it would prefer to have no specific consequences in the event of non-compliance.

Two of the Commissions questions address areas where 21st century has had problems with Ameritech in coordinating information electronically. These areas include out of service trouble reports, 21st Century Exhibit 1.0 at 4, and address validation, 21st Century Exhibit 1.0 at 7. In addition, 21st Century addresses where Ameritech's practices establish opportunities for "winback" marketing. (Attachment A, item2 (d) Winback marketing)

1. Out of Service Trouble Reporting

21st Century witness Kristen M. Smoot demonstrated why parity does not exist when 21st Century trouble reports are compared to similar types of reporting between Ameritech affiliates. Specifically, Ms. Smoot explained how parity is not always achieved with respect to out of service trouble reporting due to the way Ameritech distinguishes between service orders and trouble reports.

As Ms. Smoot testified, in the normal course of operations, equipment within the Ameritech collocated central office requires a Line Equipment Network ("LEN") change and a related Customer Facilities Assignment ("CFA"). 21st Century requests that Ameritech move the central office connection from the defective switch termination to a new termination. However, this request is categorized by Ameritech as a normal service order (i.e. 48 hours to supply a Firm Order Commitment ("FOC"), 5 days to complete). 21st Century Exhibit 1.0 at 4-5.

As the record demonstrates, this problem can be compounded when 21st Century receives the customer trouble report after 5:00 p.m. on Friday. Because Ameritech only processes service orders between the hours of 7:00 a.m. and 5:00 p.m. Monday through Friday, there is an inadequate remedy for the customer. Ameritech's witness agreed that if 21st Century gets the trouble report after 5:00 on Friday, the matter will not receive any attention until 7:00 a.m. on Monday morning. Tr. 2424. Because the 21st Century trouble report requires the assignment of a new LEN / CFA, Ameritech treats it as service order. However, when one of Ameritech's retail customers has the same problem, Ameritech treats it as trouble report. Therefore, due to Ameritech's categorization of 21st Century's customer report, 21st Century's customers are treated with much less urgency - resulting in an unnecessary delay of two (2) to five (5) days where the 21st Century customer is out of service. Tr. 2424.

Ameritech filed the rebuttal testimony of Terry Appenzeller who claimed that 21st Century's out of service trouble reporting problem is a result of deficiencies in 21st Century's network. Additionally, Ameritech claimed that the time interval for repair can be "streamlined" if the proper procedures are followed at the time the change is requested. However, Ameritech's testimony and the procedures alluded to fail to address the problems as outlined in Kristen Smoot's testimony on re-opening. 21st Century Exhibit 1.0 at 11.

On cross-examination Mr. Appenzeller admitted that 21st Century's issue was a concern, that a customer would receive no attention for such a service order problem from Ameritech until several days later and that this is not what customers should expect. Tr 2425. Ameritech's witness was unaware that 21st Century has made repeated requests for written procedures to address this problem. Tr. 2425. Nonetheless, Mr. Appenzeller agreed it would be a good idea to have such procedures in writing so the parties would know what each is expected to do in particular circumstances. Tr. 2425.

This type of treatment is inferior provisioning to that which Ameritech provides its own retail customers. If the same problem occurred with an Ameritech customer, under the assumption that this problem is a trouble report (Tr. 2421), Mr. Appenzeller acknowledged that Ameritech would issue a trouble ticket that would be responded to within (24) hours. In 21st

Century's situation, the time interval for making the change cannot be "streamlined" due to Ameritech's policy which identifies the trouble as a service order, rather than a trouble report. This type of trouble is not treated by Ameritech with the same level of urgency as it would treat trouble involving one of its retail customers. Additionally, the trouble currently cannot be measured by existing or proposed performance measures. 21st Century Exhibit 1.0 at 6.

However, as Ms. Smoot stated in her testimony, a two-part Service and Repair Performance Measure procedure, if incorporated in Illinois, would insure greater service and repair parity between Ameritech's affiliates and CLECs. The first part analyzes past service and repair which the ILEC performed for its affiliates and CLECs. This determines whether there are substantive or procedural differences in the quality and performance of ILEC service and repair between its affiliates and CLECs. Secondly, current trouble handling processes are observed to determine mean repair times for ILEC affiliates and CLECs. Such a measure would allow for active participation by CLEC network operation center managers to input first-hand knowledge of specific issues and problems in obtaining service. 21st Century Exhibit 1.0 at 6-7.

2. Address Validation

The second OSS issue that 21st Century has encountered is ensuring address validation with Ameritech. Address validation should be a routine, "technical" function when a CLEC places an order with Ameritech. Unfortunately, as Ms. Smoot demonstrated, the process often results in needless and costly delays to 21st Century and its customers.

The process of address validation generally requires that both the ILEC and the CLEC use the ILEC's street address guide (SAG). However, due to a flaw in Ameritech's procedures, Ameritech periodically rejects 21st Century orders that exactly match Ameritech's SAG. Further, Ameritech often over-scrutinizes CLEC service orders, and will reject them for the slightest deviation from the SAG. Ms. Smoot gave an example where the SAG identifies a service location as "123 Main St., Flr 2-Frt." Ameritech is likely to reject 21st Century's order showing "123 Main St., Flr 2 Frt" as the address. The absence of the "-" is sufficient as an Ameritech operations process to reject the order. Rejections of exactly matched addresses or mis-matches similar to the preceding example have resulted in order rejection rates of twenty five percent (25%) due to mis-matched addresses in any given day. 21st Century Exhibit 1.0 at 8. Each mis-match rejection, whether valid or not, automatically delays 21st Century a minimum of 48 hours. This again points to the lack of parity between Ameritech's treatment of CLECs and its retail customers. It is doubtful that Ameritech retail customers would receive, or tolerate, such a delay under a similar scenario.

Ameritech quickly dismisses 21st Century's address validation problem as the sole result of 21st Century's "order accuracy." However, on cross-examination Mr. Appenzeller was unable to provide the percentage of orders rejected solely due to 21st Century's error. Mr. Appenzeller further admitted that Ameritech itself intercedes in what is supposed to be an electronic process and makes certain computer edits regarding coordinated "hot cuts" and "frame due times" which can cause order rejections. In other words, even though 21st Century correctly follows Ameritech's procedures to the letter, an order may be rejected resulting in a customer who does not get their requested service simply because Ameritech chooses to intervene by adjusting the computer information fields in the system. Ameritech's response is another attempt at putting all fault at the feet of the CLEC, in denial of its responsibility to treat CLECs equal to its retail customers.

3. Re-use of loops

Ameritech's processes often have the effect of promoting inefficiency between CLEC's and their customers. An example of this is the process of connecting a customer to a CLEC. This process is handled using EDI – the method Ameritech recommends for CLEC service orders. The 21st Century customer is first required to issue a separate disconnect order (in writing) for their "old" number. When the CLEC customer requests a new telephone number, Ameritech's EDI does not support a process to handle a disconnect order for their old number from the ILEC and reuse of the loop. 21st Century is therefore forced to order a new loop for the customer even though a loop exists that could be re-used. Additionally, Ameritech's policy requires that both Ameritech and 21st Century dispatch trucks to coordinate the removal of the jumper from one loop by Ameritech and the installation of another jumper to the new loop by the CLEC.

On cross examination, Mr. Appenzeller admitted that he had failed to address the problem outlined in 21st Century's testimony. Tr. 2415-16. In his testimony, Mr. Appenzeller merely discussed the general nature of EDI applications used by Ameritech. Ameritech's witness obviously knew 21st Century had raised a valid point with respect to the reuse of loops and tried nonetheless to hide behind his own mis-characterization of the issue.[7]

[7] It is actions like these where Joint Applicant's seem to make matters worse by failing to be up front with

Mr. Appenzeller further admitted that Ameritech's present procedures, regarding reuse of loops when the number is not being ported, require the dispatch of at least one truck for the coordination of loops, and are an inconvenience to the customer. Tr 2416. When asked on cross-examination whether this was efficient, Mr. Appenzeller not only agreed that it was not, but also admitted that it is inappropriate for Ameritech to foster inefficient procedures or unnecessary expenses. Tr. 2418.

From a parity perspective, 21st Century and its customers are forced to incur extra time and expense that Mr. Appenzeller admitted would not be incurred by Ameritech's retail customers. Tr. 2417. Ameritech's customers can change phone numbers without ordering an additional line and without issuing a separate disconnect order for their current number. Tr 2417.

Ameritech originally stated that, in its experience, 85% of unbundled loop orders for existing customers retain their existing number. Subsequent to the filing of its testimony, Ameritech contacted 21st Century upon learning that the correct percentage was 65%. Tr. 2417. Therefore, by Ameritech's own admission, 35% of the time CLECs are forced to incur wasted time and expense to order a new loop for their customer, when customers could in many instances simply re-use the existing loop. Mr. Appenzeller asserted that it was inappropriate to produce needless work or expense for the parties, but that is exactly what Ameritech's polices condone. Tr. 2418.

4. Collocation Commitment Dates

CLEC suspicions regarding Ameritech's real commitment to competition and the concerns of new local exchange telecommunications entrants.

21st Century provided evidence that Ameritech has been unable to honor its commitment due dates for collocation arrangements. In particular, Ameritech committed to provide collocation space at the Franklin Street Central Office to 21st Century by March 18, 1999. 21st Century Exhibit 1.0 at 12. Through repeated fumbling, Ameritech relegated 21st Century's facilities to areas inappropriate for collocation. Initially, 21st Century was allocated collocation space in a fire escape walkway; later it was found that the route that Ameritech had planned for the connection of 21st Century's fiber to the mainframe switch was full, requiring substantial re-engineering. As a result of Ameritech's poor handling of this matter and lack of quality control, 21st Century was provided collocation space, originally due to be delivered on March 18, in early July of this year. This date was over 3-1/2 months late and has caused 21st Century extraordinary cost and inconvenience. 21st Century Exhibit 1.0 at 13.

Ameritech's witness Mr. Appenzeller asserted that 21st Century was told the space was available on February 23, 1999 and that 21st Century then failed to commit to using the space so it went to another carrier. Joint Applicants' Exhibit 12.1 at 19. Unfortunately, Mr. Appenzeller was uniformed of the facts surrounding this issue. Tr. 2431. He was not involved in the discussions or the process and knew only what was told to him by others who were not present in the hearing room. Tr. 2430. 21st Century was informed in January that Ameritech could not make its commitment to provide the collocation space. Mr. Appenzeller said he was not told about this. Tr. 2430. Mr. Appenzeller, however, did acknowledge that to schedule a collocation the parties have to be in pretty close contact and are usually talking to each other on a regular basis. Tr. 2430. As Mr. Appenzeller, offered 21st Century and Ameritech are in the same building and only one floor apart in the Merchandise Mart. Tr.

2430. He also admitted that the collocation manger, Mr. Boucher, would certainly be informed of any pre-collocation construction that had to occur such as laying fiber to the manhole outside of the office. Tr. 2431. In fact, this work was done on February 15,1999 and Mr. Boucher was informed by 21st Century's witness in this case, Ms. Smoot. It was not until the day of the collocation installation on April 22, 1999 that Ameritech informed 21st Century that Ameritech was not ready because the ILEC had placed 21st Century's facilities in a fire exit walkway.[8] 21st Century Exhibit 1.0 at 13.

Therefore, even though Mr. Appenzeller's primary responses to this line of questioning was "I don't know," in fact we can reasonably surmise what happened from the usual course of conduct of the parties and the importance of placing electronic equipment in Ameritech's central office entails. Ameritech knew 21st Century was coming to that collocation space because the parties are only one floor away and were constantly speaking to one another. Tr. 2430. It is simply unreasonable to assume Ameritech would watch as a CLEC brought fiber to the manhole outside the central office and not pay attention to what was going on. It is also questionable that Ameritech would let someone through security into the cental office unless it was planned for and scheduled between the parties.

21st Century believes this collocation problem is a prime example that illustrates the importance of performance measures that track the quality of an ILEC's service. In order to insure that CLECs are treated in the same manner as Ameritech's retail customers, narrowly construed performance measures must be able to accurately assess the ILEC's performance.

[8] It should be noted that while Mr. Appenzeller's testimony blames 21st Century for these events he never denies that Ameritech placed 21st Century in a fire exit walkway.

Currently, absent sufficient performance standards, all too often 21st Century suffers from a lack of parity in comparison to Ameritech's retail customers.

As Ms. Smoot stated in her testimony, Joint Applicants attached a list of the performance measures used in Texas. 21st Century Exhibit 1.0 at 14. For example, Texas Performance

Measure 107, percent missed collocation due dates is a measure to track this type of inadequate performance. See Attachment 1 to SBC/Ameritech Ex. 10. This performance measure, however, is not stringent enough. The Texas proposal provides numerous business rules that allow SBC to effectively avoid meeting specific due dates without any real meaningful penalty to the ILEC. In addition, the fact that the ILEC completes a certain percentage of due dates on time does not negate the fact that one office was 3 ½ months late receiving collocation space, causing the CLEC to incur unnecessary expense and lost revenue.

As 21st Century demonstrated, without a precise method for measuring and a complete set of standards and penalties, Ameritech will choose to do whatever is in its financial, rather than service or equity related, interest. This is why 21st Century believes this Commission must address the need for incident based liquidated damages where the Utility fails to adequately perform agreed-to functions. Because of the importance of meeting the demands of its customers in a timely manner, 21st Century cannot accept Ameritech's behavior that delays rollout of service. Understandably, customers blame 21st Century, not Ameritech when service delivery is late or fails altogether.

Therefore, the Commission's question (C) enforcement, addressed this important concern regarding how the Joint Applicants' non-compliance with commitments would be enforced.

enforceable incident based liquidated damages. This is especially important due to the Joint Applicants' ability to narrowly categorize its own procedures so that many of the CLEC's issues

See e.g., Question (c)

5. Failure of Ameritech's Signal Control Point

21 Century must rely on Ameritech's service to the same extent that Ameritech's retail customers do. However, CLECs are often not afforded the same treatment and considerations

customer often reflects poorly on the CLEC itself. For these reasons, Ameritech should be required to promptly inform its CLEC customers of any network outage, including specific

On May 26, 1999 a major failure occurred in Ameritech's Signal Control Point ("SCP"). 21 Century Exhibit 1.0 at 15. The failure caused an estimated one hundred thousand ported

the majority of whom were trying to reach CLEC customers, heard a computer generated voice message that stated that the number had been disconnected. The outage was not only of great

reputation. 21 Century Exhibit 1.0 at 16.

21st Century was not informed of the outage by Ameritech in a timely fashion. Mr. Appenzeller asserted in his pre-filed testimony that 21st Century was informed by an e-mail message on the day of the outage. Ameritech's witness stated that "Ameritech Illinois did promptly identify the CLEC community (including 21st Century) by e-mail of the SCP failure on May 26." Joint Applicants' Exhibit at 20. When asked about this matter on the stand Mr. Appenzeller reiterated the statement:

Question. It is your understanding the e-mail was sent to 21st Century (on May 26).

Answer. Yes. Tr. 2418-2420.

Mr. Appenzeller was wrong, as he must have known, because the document he purported to have as evidence – an e-mail message – was clearly dated June 15, 1999, not May 26, 1999. Mr. Appenzeller failed to correct the record. In the hearings on July 15, 1999, in a colloquy before the hearing examiners, counsel for Ameritech admitted that 21st Century did not receive the purported e-mail notice on May 26, as Mr. Appenzeller had stated. Tr. 2956-2960. Ameritech finally came clean and acknowledged that 21st Century was correct – there had been no e-mail providing a written statement of even a cursory explanation of the outage until June 15, three weeks after the occurrence of this network failure. Tr. 2958.

This is another example of how cavalierly CLECs and their customers are handled by Ameritech and what may portend for similar treatment by the merged entity. In the final analysis, the problem caused by Ameritech and its contractors has to be remedied by 21st Century, which is forced to explain the incident to its customers, without the benefit of an explanation from Ameritech.

6. Make Ready Requests

Ameritech, again, has failed to treat 21st Century as it would its own retail customers in the build out of 21st Century's fiber network. Ameritech is required to "make ready" poles for use by 21st Century by modifying the pole and adding brackets so 21st Century can attach fiber. However, Ameritech has not committed the resources necessary to meet the schedule originally developed between the parties. Ameritech's actions have impeded 21st Century's build out of its fiber network. However, as Ms. Smoot testified, Ameritech is on schedule with its own network build-out.

Ameritech, in typical fashion, blames 21st Century for having a "very aggressive build schedule that was developed without input from Ameritech Illinois." However, during cross examination, it was shown that Mr. Appenzeller was unaware that 21st Century has had a pole agreement with Ameritech since 1996 and that dozens of meetings and arrangements have been coordinated between the parties over the years. Tr. 2433. Therefore, Ameritech cannot simply "shrug off" responsibility for delays to the build-out schedule on 21st Century by implying Ameritech is not informed of the CLECs actions.

B. Response to the Commission's Questions – 21st Century Recommends These Necessary Operational Conditions.

21st Century believes that the Joint Applicants' merger will fail the criteria set forth in the Illinois Public Utilities Act unless this Commission imposes conditions that protect the public interest. 21st Century is concerned with conditions that affect its ability to offer a variety of facilities-based services and therefore suggest the following provisions in the event the merger is ultimately approved by this Commission.

- Establish a performance bond sufficient to address violations by Joint Applicants in Illinois (See Covad exhibit 1.0 at $300.00.

- Initiate an expedited contested commission docket to implement a permanent common transport element.

- Require implementation of all 122 performance measures identified before the Texas Public Utilities Commission within 6 months of the approval of the merger.

- Require the Joint Applicants to continue obligations for performance measures for a minimum of 6 years following the approval of the merger.

- Promulgate a Commission order mandating incident based liquidated damages shall apply to all interconnection agreements in effect at the conclusion of this proceeding as well as for all interconnections agreements, effective upon the submission of a letter by the CLEC requesting incident based liquidated damages.

- Joint Applicants shall make all interconnection arrangements and agreements, whether negotiated or arbitrated, available to CLECs in Illinois. In order to comply with Section 252 (i), Joint Applicants request for a "similarly situated" caveat should be denied. In order to ease the administrative burden of this commission, Joint Applicants shall submit electronic versions to an essential repository of the ICC.

- Joint Applicants may not establish a national local subsidiary for 6 years subsequent to the approval of the merger. Additionally, the Commission will initiate an investigate of Joint Applicants use of affiliate entities, including review of the standards for determining when facilities provisioned from the ILEC are deemed unavailable for use by CLECs .

- The Commission should require the implementation of a service and repair performance measure. The measure will address past service and repair which the ILEC performed for its affiliates and CLECs. This allows for a determination whether there are substantive or procedural differences in the quality and performance of ILEC service and repair between its affiliates and CLECs. Secondly, current trouble handling processes are observed to determine mean repair times for ILEC affiliates and CLECs. Such a measure would allow for active participation by CLEC network operation center managers to input first-hand knowledge of specific issues and problems in obtaining service.

- The Commission should insist that SBC-Ameritech modify Interconnection Commitment A so that it will make available, upon a carrier's request, any method, term or condition of interconnection and nondiscriminatory access to unbundled network elements that SBC-Ameritech offers or provides in any other states, *i.e.*, including arbitrated terms and conditions.

III. Arbitrated Arrangements and Agreements

Joint Applicants' proposal that arbitrated agreements SBC has been ordered to enter into can not be part of the package of agreements offered here in Illinois is illegal. Interconnection Commitment A (made in response to Chairman Mathias' Question No. 2 in Attachment A to his June 4th letter) states that SBC-Ameritech will only offer terms and conditions of interconnection and access that SBC "voluntarily" agrees to provide to CLECs in other states. Limiting the ability to opt into other terms and conditions to those that have been "voluntarily" agreed upon severely diminishes the benefit of this commitment and creates an incentive for SBC/Ameritech to arbitrate every marginal issue. Thus, the Commission should insist that SBC-Ameritech modify Interconnection Commitment A so that it will make available, upon a carrier's request, any method, term or condition of interconnection and nondiscriminatory access to unbundled network elements that SBC-Ameritech offers or provides in any other states, *i.e.*, including arbitrated terms and conditions.

Further, as noted by Sprint's witness Mr. Morris, limiting this condition to negotiated agreements severely reduces its benefit to Illinois because it takes off the table the commitments that SBC and Ameritech only make under regulatory pressure:

> It has been Sprint's experience with the Joint Applicants that they have been generally unwilling to voluntarily agree to many terms and conditions that are vital to competitive entry. It has taken arbitration before various commissions to gain many of the terms

> and conditions that are available today. The arbitrated terms and conditions may be thought of as the "best practices" available. The Joint Applicants, desiring to keep the entry bar high, are resisting the implementation of "best practices" in Illinois by proposing to bar the use of arbitrated terms and conditions from other states in Illinois.

Staff correctly noted that many CLECs feel that "the only way to obtain parity from the ILEC is through costly arbitration. From the start, CLECs are at a disadvantage in arbitration, just from the economic and legal power that the established ILECs possess. Arbitration results from other states should be available to CLECs in Illinois as a matter of parity, efficiency, and economics.

Further, Staff found that "SBC's commitment contains exceptions which are too expansive and which eliminate a large part of the Joint Applicants' alleged benefits. First, if SBC were to negotiate agreements with Ameritech Illinois as a CLEC, other CLECs would have the benefits of those agreements within Illinois pursuant to Section 252(i). As this Commission has previously found,[9] Section 252(i) ensures that CLECs can "opt into" interconnection agreements under the same terms and conditions as the original negotiating/arbitrating CLEC.[10]

Mr. Deanhardt also testified that Covad's experience indicates that litigation and arbitration have been the only means of making progress in obtaining collocation and unbundled elements from SBC and its affiliates. Adoption of Joint Applicants' proposal would deny other carriers of the benefits of arbitration awards in other states. As Mr. Deanhardt

[9] QST Com Inc., ICC Docket No. 98-0603 , and see the FCC Local Competition Order at para. 1302, 1318.

[10] The only caveat to an opt in arrangement is where unless one of two conditions are proven by ILEC: (1) its "costs of providing a particular interconnection, service, or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement," or (2) "the provision of a particular interconnection, service, or element to the requesting carrier is not technically feasible." 47 C.F.R. Sec. 51.809(b).

stated:

> Our experience tells us that SBC-Ameritech's proposal would only encourage SBC and Ameritech to arbitrate every questionable issue in all other states – because in doing so, they would minimize the number of "voluntary" commitments they would have to make available in Illinois.
>
> In summary, what SBC-Ameritech promises to provide in Interconnection Commitment A – "voluntary" terms – will not amount to much. In general, non-arbitrated clauses are not arms-length arrangements, and they are "voluntary" only in the sense that the requesting carrier has "voluntarily" decided that it was better off getting into business in a state with a markedly inferior interconnection agreement than to be shut out of the state entirely. ILECs like SBC understand this motivation and use the leverage to the hilt. The most significant issues – such as the rates, terms and conditions of nondiscriminatory access to collocation and unbundled xDSL loops – are resolved more favorably to CLECs in arbitrations.

Mr. Deanhardt testified that SBC has forced carriers to arbitrate several important issues such as loop availability, spectrum management policy, OSS access and collocation rights. Currently, Covad and ACI are engaged in an interconnection arbitration relating specifically to DSL service. The issues in that arbitration proceeding include: the method by which Covad will obtain nondiscriminatory access to xDSL-compatible loops, SBC's DSL spectrum management policy, and OSS (including access to fundamental network information).

The Commission should be wary of Joint Applicants' attempts to avoid implementing the findings in that arbitration in Illinois by making a distinction between negotiated and arbitrated decisions. This is particularly true for smaller CLECs. As noted by Mr. Deanhardt:

> Oftentimes, a CLEC like Covad must settle for "second (or third, or fourth) best" agreements in certain states because resource requirements and business necessity mean

> that arbitrating in every state is not an option. Because every month of arbitration is a month in which CLECs like Covad cannot enter the market or provide more efficient service to consumers, ILECs like SBC and Ameritech have an incentive to continue this litigious, state-by-state process. The reality is that requesting carriers cannot afford to litigate every issue in every state, and this Commission does not have the resources to litigate every issue in Illinois.

Joint Applicants' unwillingness to allow carriers in Illinois to gain the same benefits that carriers will have in Texas undermines the applicants' claim that one of the benefits of the merger is that Illinois will gain the benefits of SBC's "expertise" in providing a variety of services. It also undermines their commitment to deploy ADSL service in Illinois as a condition of the merger (Joint Applicants' Commitment F).

The Texas Proposed Interconnection Agreement ("PIA") is another example of an important arbitration proceeding whose benefits would be unavailable to Illinois. Mr. Morris testified that many of the CLECs that are participating in this proceeding participated in the negotiations that resulted in the PIA. The Illinois Commission's adoption of the PIA, either in its entirety or by adopting particular terms, would prevent the parties from "reinventing the wheel."

Thus, the Joint Applicants should be required to provide CLECs in Illinois with the same

services, facilities or interconnection agreements/arrangements (except as to price) that any SBC affiliate has voluntarily negotiated, or has been ordered to provide under an arbitration conducted in accordance with the federal Telecommunications Act in another state.

IV. Joint Applicants Continue to Misapply the DOJ Merger Guidelines as the Legal Basis for This Merger

The Joint Applicants continue to justify the merger on a misunderstanding of federal precedent and a failure to apply Illinois law. Joint Applicants' Response to the Commission's June 4, 1999 Letter. The Joint Applicants fail to look beyond the surface of the 1984 Merger Guidelines, which they claim the FCC relies upon in making its decisions in similar cases. However, the telecommunications industry is not sufficiently similar to the model used for the development of the 1984 Merger Guidelines. For this reason, the FCC does not rely on a plain reading of the guidelines -- but on the "underlying policy and economic analysis of the 1984 Merger Guidelines.[8] The FCC departs from the standards that were articulated in those guidelines for several reasons. In the typical potential competition case the relevant markets are oligopolies with four or more competitors. However, the FCC notes that markets for local exchange and exchange access services presently "have only one current supplier as a practical matter."[9] Additionally, the Merger Guidelines were modeled after a stable market where potential entrants have decided not to enter. By contrast, the telecommunications markets are undergoing major change and new entry is anticipated. The FCC concludes:

[8] FCC BA/NYNEX Order, ¶66
[9] Ibid.

> We . . . see no reason to apply mechanistically the 1984 Merger Guidelines' provisions on potential competition to the novel features of telecommunications markets, and will evaluate the number of most significant market participants and the competitive effects of mergers among them, even where three other potential competitors with equivalent competitive capabilities to the merger parties remain.[10]

The Joint Applicants also rely on the outdated 1980 edition of *Antitrust Law* by Philip Areeda and Donald Turner to find support for their position that six potential entrants are sufficient to eliminate anti-competitive concerns arising from elimination by merger of a potential competitor.[11] However, the 1996 edition of *Antitrust Law* by Philip Areeda and Herbert Hovenkamp is not nearly as supportive to the Joint Applicants' position. "When one of the merging firms is a monopolist and the other is a potential entrant into the same market in which the monopolist has its power, anti-competitive concerns are much more realistic."[12] The authors further state:

> Accordingly, we would adopt a relatively severe approach to holders of significant monopoly power: The acquisition of any firm that has the economic capabilities for entry and is a more-than-fanciful possible entrant is presumptively anti-competitive, unless the acquired firm is no different in these respects from many other firms.[13]

The source of the Joint Applicants' relied upon position clearly would not condone a merger under the current telecommunications market conditions. Absent SBC as a potential competitor, there are not a sufficient number of other likely potential competitors. An approved merger would slow, and potentially reverse, the development of competition in Illinois, thereby harming Illinois consumers.

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[10] FCC BA/NYNEX Order, ¶66.

[11] Joint Applicants' Response, p. 5 (ftn. 5).

[12] Philip E. Areeda and Herbert Hovenkamp, *Antitrust Law* (rev. ed. 1996), Vol. III, ¶701d at pp. 134-135.

[13] Ibid., p. 136.

A. <u>The Merger Must Be Denied Under SBC's Own Analysis</u>

1. Other standards of Review

If the Commission were to apply the DOJ standards (as the Joint Applicants suggest), this merger should be rejected. SBC's assumption that, with three potential competitors, the proposed merger with Ameritech "automatically" cannot be anti-competitive, is just one example of SBC's over-reliance on the *Horizontal Merger Guidelines.* Joint Applicants' Initial Brief, at 49-52 and 57, and Joint Applicants' Response to the Commission's June 4th Questions, at 1-4. The Department of Justice clearly stated that the merger guidelines are not to be used without exercising judgement in evaluating a merger under the anti-trust laws.[14]

SBC views the subject merger as a geographic extension of separate markets in Illinois and Missouri – it believes there is no effect on the concentration in a single market. SBC assumes that even a "Super Region" merger of most of the RBOCs would still not rise to the level of an unacceptable concentration. Tr. 1225-28. SBC maintains that the combination of SBC, PacTel, Ameritech, Bell Atlantic/NYNEX, and GTE would still not raise sufficient concentration in the relevant market to prevent the merger. Tr. 1225-28. SBC's theories are simply implausible.

If one were to accept SBC's argument that the merger guidelines are the appropriate mechanical choice for evaluating the merger, SBC's analysis would still lead to the same conclusion: the subject merger is anti-competitive and this Commission should, accordingly, choose to deny it. SBC has the capability, the resources, and is poised (even under the National Local strategy) to enter the Illinois market.

The Joint Applicants argue that the analysis of the merger's competitive effects under 7-

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[14] SBC/SNET Order, 13 FCC Rcd.

204(b)(6) should be evaluated under the Department of Justice's *Horizontal Merger Guidelines*. Joint Applicants' Response to the Commission at 1-4, and Joint Applicants' Initial Brief at 42. They argue further that nowhere in the testimony of their own witnesses is any indication of SBC's current plans to enter Ameritech territories except through acquisition of Ameritech. Joint Applicants' Exhibit 1.5 (Kahan) at 2, and Joint Applicants Initial Brief at 52.

However, 21st Century contends that based on the reasoning in Falstaff, SBC should be considered a potential competitor. As such, SBC's testimony is not a proper source for determining whether SBC has the intent to enter the Illinois market. Rather, the correct analysis is whether it is objectively reasonable to believe SBC has such an intent to enter Illinois.[15] Finally, if the ICC believes SBC has no intent to enter Ameritech's territory, and chooses to apply the DOJ standards (as SBC insists), the ICC should still come to the conclusion that this merger will have anti-competitive effects on the Illinois market and must, therefore, be denied as a matter of law.

The Commission should closely consider why companies such as 21st Century oppose the merger of SBC and Ameritech. 21st Century's reasoning is simple. SBC is a Bell operating company with experience in providing local exchange service and in interconnecting with competitive local exchange carriers. With its knowledge of local exchange operations, SBC would be positioned better than any other competitor to challenge Ameritech's day-to-day operational delaying tactics. All competitive carriers would benefit from the successful challenge of those tactics. In other words, SBC is the best chance Illinois has to batter down the walls of

[15] And see Justice Marshall's Concurring opinion in *Falstaff*, where he states: I would hold that where, as here, strong objective evidence indicates that a firm is a potential entrant into a market, it is error for the trial judge to rely solely on the firms subjective prediction of its own future conduct. *United States v. Falstaff Brewing Corporation,*

Ameritech's 97% market share. CLECs such as 21st Century would be able to move through the gaps created with SBC's aid. Upon merger approval, however, SBC will be standing shoulder to shoulder with Ameritech, defending the now-strengthened walls.

B. SBC is a Potential Competitor of Ameritech under The Falstaff Analysis.

SBC argues that the ICC Staff's concern that SBC is a potential competitor under the Falstaff analysis is "entirely novel in asking the Commission to make specific predictions about what the telecommunications market in Illinois may look like."[16] SBC criticizes Staff witness Dr. Hunt's inability to make predictions about what telecommunications markets in Illinois might look like three to five years in the future. SBC maintains that the test is novel and thus speculative in the area of telecommunications. However, it appears that SBC does not understand the principle. While criticizing Dr. Hunt, and trying unsuccessfully to shake him from his principles during cross examination, SBC ignores established precedent that highlights this very point. Joint Applicants' Brief, at 52-53. In the past, courts used Section 7 of the Clayton Act because agencies are required to predict what the competitive frame-work will look like in years to come. FTC v. Elders Grain, US v. Falstaff, FTC v. Procter & Gamble Co., and, Black and Decker v. Marine Bancorp were all cases in which courts rejected mergers where the effect of entry was detrimental to competition.[17]

SBC has previously argued that the Falstaff language has not been used in the past 23 years. Joint Applicants' Initial Brief, at 53. In fact, in its1989 Illinois decision in FTC v. Elders

et al., 410 U.S. 526, 35 L.Ed.2d 475 (1973).

[16] Joint Applicant's Initial Brief, at 47

[17] *Federal Trade Commission v. Elders Grain, Inc., and Illinois Cereal Mills, Inc*., 868 F.2d 901 at [3]

Grain, Inc., the Seventh Circuit Court of Appeals rejected a merger based in part on the fact that "the statute [Section 7 of the Clayton Act] requires a prediction, and doubts are to be resolved against the transaction."[18]

"Section 7 of the Clayton Act forbids mergers in any line of commerce where the effect may substantially lessen competition."[19] This section bars mergers where an entrant threatens to upset market conditions to the detriment of competition.[20] Further, even if a company is not currently competing in the market, its entrance by merger is suspect when the company is situated as a potential competitor and is likely to exercise beneficial influence on competitive conditions in the market.[21] Therefore, even if such a new market entrant were to offer the same services under the same conditions as the acquired company, the company may nevertheless violate Section 7 by eliminating a potential competitor exercising a competitive influence on the market.[22]

In reviewing perceived potential competition in Falstaff, the court denied the acquisition under Section 7 of the Clayton Act because "Falstaff was a potential competitor in the sense that it was so positioned on the edge of the market that it exerted beneficial influence on competitive conditions in the market."[23] The court's decision was made despite the Falstaff executive's testimony that "Falstaff had consistently decided not to attempt to enter said market unless it could acquire a brewery with a strong and viable distribution system such as that possessed by [the acquired firm]." The Supreme Court made it clear that this "case is not what Falstaff's

[18] *Id., emphasis added.*

[19] *United States v. Falstaff Brewing Corporation, et al., 410 U.S. 526, 35 L.Ed.2d 475 at [2]*

[20] *Falstaff, at [2], citing FTC v. Procter & Gamble Co., 386 U.S. 568 at 578-80, 84 S.Ct. 1224 at 1230-31 (1967).*

[21] Id.

[22] Id.

[23] *Falstaff*, 410 U.S. 526 at [4]

internal company decisions were, but whether (given its financial capabilities and conditions in the New England market) it would be reasonable to consider it a potential entrant into that market."[24]

Using the perceived potential competition analysis in the case at bar, irrespective of the fact that SBC's executives had stated SBC has no intentions of entering Illinois, SBC is a potential competitor in the sense that it is so positioned on the edge of the market that it exerts beneficial influence on competitive conditions in the market. Following the Supreme Court's merger analysis, the ruling in this case should not be based on what SBC's internal statements are, but whether (given SBC's vast financial capabilities and conditions next door in Missouri, not to mention in Illinois itself) it is reasonable to consider SBC a potential entrant in Illinois.[25] Based on the record, it is objectively reasonable to consider SBC a unique potential competitor because if SBC were not able to acquire Ameritech, it would have to enter the Illinois local market either *de novo* or through a toe-hold acquisition in order to meet the goals of its National Local strategy. Both the State of Illinois and the Chicago area are of interest to SBC: the Company has to meet its prescribed goals in reaching the entities sought after in its National Local strategy. Therefore, it is objectively reasonable for telecommunications competitors in Illinois to consider SBC a potential competitor, especially in consideration of its expansive financial capabilities. The Supreme Court reasoned that if market entry would appear rational to a new potential competitor, its entry by merger becomes suspect under Section 7."[26]

SBC can be characterized as being both an authorized cellular carrier in Illinois and a landline carrier poised on the Illinois border. That makes the Company a uniquely strong

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[24] Id.
[25] Clearly, SBC's statements on the record are important pursuant to the ICC's Section 7-204 analysis.
[26] *Falstaff*, 410 U.S. 526 at [5]

potential competitor. As SBC acknowledged, its affiliates maintain switches and other facilities in Illinois and have operational support in billing customer services and OSS systems.[27] Therefore, SBC is different than other CLECs and has the important advantage of substantial assets and a large customer base from which it can enter the local market. Unlike many nascent CLECs who, because of limited capital, must carefully choose limited market niches, SBC has tremendous available resources and a customer base that other carriers envy.

Finally, because of SBC's unique resources, if the Company was to challenge Ameritech's lock on the local exchange market, it would have significant deconcentrating impacts. SBC is one of the few telecommunications companies (aside from Bell Atlantic/NYNEX) that could immediately and significantly challenge Ameritech in obtaining customers and radically change the competitive environment.

SBC, like Falstaff, is a regional company seeking to merge with another company under the guise of "going national." Falstaff was not competing in the market it sought to enter. Further, if Falstaff entered a new market through merger, its competitive conduct in the market would have been the mirror image of that acquired company. The same truth applies to SBC. If the ICC applies the analysis put forth by the Supreme Court in Falstaff, it will hold that this merger fails the same standards SBC believes should apply – the DOJ Merger Guidelines.

Similarly, in the case at bar, SBC is a regional company trying to extend its operations to meet the goals of its National Local strategy. SBC maintains it is not competing in the Illinois local market and seeks to enter through a merger that would offer products of the acquired company – Ameritech. Merger is no more acceptable in this case (under Section 7) then it was in

[27] As ICC Staff found, SBC's back office facilities, like billing and OSS etc., are useful for more than just its

the Falstaff case. If merged with Ameritech, SBC will violate Section 7 because it will destabilize the market in Illinois to the detriment of competition. Competition is hurt even if SBC is not a current competitor and even if there is no evidence of SBC's plans to enter the Illinois market *de novo*. Under the DOJ Merger Guidelines, SBC is still a potential competitor of Ameritech. Mr. Kahan continued to assert that SBC was not a potential competitor in Illinois. Joint Applicants' statements "are corroborated by the fact that despite voluminous document production in response to exhaustive data requests, no party to this case submitted any evidence that supported a present plan by SBC to enter that market." (Joint Applicants' Exhibit (Kahan) 1.5 at 2. emphasis added). SBC's assertions are beside the point now that the record is clear that SBC's plans of entry were not out of date, but reflected a consistent viable option to take advantage of attractive Illinois markets right up to the time the merger became a more realistic strategy. Nonetheless, SBC continues to misconstrue the DOJ standards. As Staff witness Graves indicated, there is credible evidence that SBC was going to come into the market. Tr. 2821. Tr. 2816.[28]

Any perceived potential competitor (including SBC) exerts an "edge" effect on the anti-competitive practices of the market. By its position on the edge of the market and its apparent willingness to enter the market under certain conditions (such as the lowering of entry barriers), the perceived potential entrant provides a present pro-competitive effect.[29] In this case, SBC, the perceived potential competitor, forces a monopolistic entity, Ameritech, into a more competitive

cellular operations. These facilities can also be employed for SBC's land line operations in this State.

[28] The evidence also supports the fact that SBC is a small actual competitor Chicago for multi-dwelling buildings. Tr. 2825. Staff found that SBC is an actual competitor even under token entry – even without SBC's management control. Tr. 2826-27.

[29] *United States v. Black and Decker*, 430 F. Supp. 729 (1996)

position. If Ameritech exerts too much market power, SBC can profitably enter the market.[30]

As demonstrated in Mr. Woodbury's Direct testimony, ILECs walk a very thin line when it comes to product pricing. ILECs use their market power to exact high prices (i.e. high profits). CLECs are not powerful enough to take a significant piece of the market, but ILECs do not set prices too high because it would attract powerful competitors, such as SBC, seeking high profit margins. "If the target market performs as a competitive market in traditional antitrust terms, the participant in the market will have no occasion to fashion their behavior to take into account the presence of a potential entrant."[31] In the subject merger case, Ameritech is fashioning its behavior to take account of the presence of a potential entrant, namely, SBC. SBC, therefore, exerts enough of a pro-competitive effect on the Illinois market so as to prevent Ameritech from extracting as high of a profit margin as it would like. This effect keeps prices lower for Illinois consumers. "Potential competition . . . as a substitute for . . . (actual competition) may restrain producers from overcharging those to whom they sell . . ."[32] In analyzing whether a company is a perceived potential entrant, the court(s) [have] stated that:

> the effect on competition in a particular market . . . is determined by the nature or extent of that market and by the nearness of the absorbed company to it, that company's eagerness to enter that market, its resourcefulness, and so on.[33]

The market in Illinois is highly concentrated and dominated by Ameritech which has

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[30] In fact this is the wonderful choice SBC has: enter *de novo* and make excellent returns, or merger, and make extraordinary returns.

[31] *United States v. Black and Decker*, 430 F. Supp. 729 (1996)

[32] *United States v. Marine Bancorporation*, 418 U.S. at 630, 94 S.Ct. at 2874, quoting Wilcox, Competition and Monopoly in American Industry, TNEC Monograph No. 21 (1940) 7-8

[33] *United States v. Black and Decker*, 430 F. Supp. 729 (1996), *and see United States v. El Paso Natural Gas Co., 376 U.S. 651, 660.*

approximately 97% of the consumers. SBC has operations very near to Illinois and is poised to enter from St. Louis. Pursuant to its self-proclaimed National Local strategy, SBC is very eager to enter the Illinois market. Finally, SBC is the third largest domestic local telecommunications carrier and the ninth largest in the world. It has excellent resources and managerial expertise. As such, it has a powerful influence on the market.

SBC's market power, National Local strategy, and similar products, as well as its resources and managerial expertise are exactly the type of characteristics that convinced courts to prohibit mergers, similar to the one proposed, in other industries. In Black and Decker, the Justices wrote:

> The Court then elucidated the factors that made Procter & Gamble the most likely entrant into the liquid bleach market: Procter and Gamble's leadership and market power in a similar industry, its diversification policy, and the complementary nature of its product which would allow exploitation of existing marketing channels of common advertising, and of management experience.[34]

It is apparent that SBC is poised on the edge of the market in such fashion so that it can apply pro-competitive effects on the Illinois market. Thus, even if the DOJ Merger Guidelines are applied in this case, and even if it is established that SBC would not enter Illinois but for the merger, the merger is prohibited as a matter of law.

Finally, Falstaff established that even if a firm would not in fact enter a market *de novo*, if it is rationally perceived by other participants in that market to be capable and likely to enter, entry by merger may be prohibited.[35] Since the evidence shows that SBC is, in fact, a perceived potential competitor, its statements regarding a lack of any current plans to enter the Illinois

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[34] *United States v. Black and Decker,* 430 F. Supp. 729 (1996)*, citing; FTC v. Procter & Gamble Co., 386 U.S. 568 at 578-80, 84 S.Ct. 1224 at 1230-31 (1967).*

[35] *United States v. Black and Decker,* 430 F. Supp. 729 (1996),at FN 34.

market are suspect, if not irrelevant. This is because it can be concluded that SBC has a pro-competitive effect on the Illinois market and that it is objectively reasonable that it would enter the Illinois market absent the merger. Thus, it is the same "prediction of outcomes" considered by courts in Falstaff, Black and Decker, and Procter & Gamble (all denying proposed mergers).

In its defense of the Federal Clayton Act analysis, SBC's position is that anti-competitive effects of the merger cannot be shown without meeting three conditions. "Section 7 of the Clayton Act forbids mergers in any line of commerce where the effect may be substantially to lessen competition."[36] The act bars mergers where the entrant threatens to upset market conditions to the detriment of competition.[37] Further, even if a company is not currently competing in the market, its entrance by merger is suspect when the company is situated as a potential competitor and likely to exercise beneficial influence on competitive conditions in the market. Therefore, even if such a company were to offer the same services under the same conditions as the company being acquired, the acquiring company may nevertheless violate Section 7 by eliminating a potential competitor exercising a competitive influence on the market. See Staff Exhibit (Graves) 4.02 at 4-13, Staff Exhibit 9.01 and Staff Initial Brief, at 53. Based on the evidence in this case, it has been demonstrated that SBC fails under each of the three elements. Accordingly, the proposed merger would surely have an anti-competitive impact, and therefore must be rejected..

V. The Merger Will Negatively Effect CLECs Like 21st Century

[36] *United States v. Falstaff Brewing Corporation, et al., 410 U.S. 526, 35 L.Ed.2d 475 at [2]*

[37] *Falstaff, 410 U.S. 526 at [2], FTC v. Procter & Gamble Co., 386 U.S. 568 at 578-80, 84 S.Ct. 1224 at 1230-31 (1967).*

There is little question that this merger would establish a company controlling the local exchange market "to such an extent that it will be unassailable."[38] With 55 million lines, SBC will be much more than just "the same old Ameritech entity merely reporting to a Texas, rather than an Illinois, board of directors."[39]

CLECs, consumers and the Commission will all suffer harms arising from this merger. As the record indicates, the Applicants have both the ability and incentive to discourage CLEC entry into their local markets. The FCC found that:

> Because an ILEC currently serves virtually all subscribers in its local serving area, an ILEC has little economic incentive to assist new entrants in their efforts to secure a greater share of that market.[40]

The FCC also stated that an ILEC has the ability to discourage entry by not interconnecting its network with the new entrant or by insisting on unreasonable interconnection conditions.[41] This merger will magnify such abilities and incentives. A combined SBC and Ameritech will be twice as large as when they were separate entities. That means that CLECs themselves would each have to grow twice as large to fight with equal force.[42]

SBC and Ameritech already engage in exclusionary behavior by refusing to provide services to CLECs at parity with the services they provide themselves. 21st Century demonstrated numerous examples where it has been denied parity as a result of substandard services – whether for reuse of loops, collocation, address validation, or reliance on Ameritech's troubled SS7 / SCP network – only to have Ameritech point the finger at others and deny any culpability. Further, the

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[38] AARP Ex.1.0 (Cooper) at 4.
[39] Id.
[40] Sprint Ex. 2.0 (Woodbury) at 31.
[41] Id.

Commission has previously found that Ameritech does not provide OSS to CLECs at parity with the service it provides to itself.[43] Moreover, Ameritech does not offer unbundled local switching on a nondiscriminatory basis.[44]

SBC has acted in the same fashion. The California Commission has received complaints that SBC was warehousing collocation sites for its own DSL service, subjecting CLECs to excessive delays in providing caged collocation space, and charging excessive rates for collocation.[45] Finally, SBC was criticized by the Texas PUC for failing to meaningfully negotiate and implement the terms of arbitrated agreements, and for taking other steps that inhibited competitive entry.[46] This issue was glaringly demonstrated by Covad's recitation of SBC's actions to hide pertinent information necessary for the PUC's deliberation and impede competitive entry in Texas. Covad Exhibit 1.0 at 18. 21st Century's concern is that Ameritech is not currently cooperating in areas important to rapid network interconnection which were addressed in the Commission's own questions to the parties.[47] If SBC comes to Illinois and continues its efforts to "hide the ball" and delay meaningful competitive entry by nascent carriers, the proposed merger suffers from exactly what Dr. Hunt has described, "the strengthening of Ameritech's already dominate monopoly position [that] would significantly inhibit the local exchange market's transition from regulation to competition." ICC Exhibit 9.01 at 3. As 21st Century has previously stated and as Dr. Hunt made clear in the reopened record, given the anti-competitive acts of the Joint Applicants, "the proposed merger is a choice for regulation over competition and a rejection

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[42] Id.
[43] Sprint Ex. 2.0 (Woodbury) at 27.
[44] Id.
[45] Sprint Ex. 2.0 (Woodbury) at 29.
[46] Sprint Ex. 2.0 (Woodbury) at 28.

of the national and state policy that deregulation and competition, rather than the continued regulation of dominant firms, shall be the preferred method of protecting consumers. Id. at 4, citing Bell Atlantic / NYNEX opinion and Order in FCC Docket 97-286, Para 35. See also, 21st Century's Reply Brief at 3.

This merger would put extraordinary power in the hands of the Applicants and weaken CLECs. Sprint's witness Woodbury testified that the SBC/Ameritech merger would weaken competitors in both the Ameritech region and in the SBC region.[48] Therefore, SBC and Ameritech would reap the rewards of doubling the harmful effects on competitors through exclusionary behavior. SBC and Ameritech would have even more incentive to hurt the competitive chances of their rival CLECs through exclusionary behavior such as unreasonable interconnection conditions.[49]

On reopening, Joint Applicants try a different tack. In cross-examining the other parties, Joint Applicants argue that aspects of their new filing are less egregious than the prior application and therefore sufficient to justify this merger. See generally, Tr. 2650-54. However, as Sprint's witness, Mr. Woodbury stated, the merger should not have the effect of hindering competition and any conditions should provide sufficient efficiencies. Tr. 2650. Mr. Woodbury reaffirmed, the merger would have adverse effect on competition. Tr. 2651-52. In his analysis, Woodbury evaluated the conditions being proposed and concluded they fail to mitigate the expected harms. Tr. 2653. The merger would reduce the amount competition in Illinois exchange markets. Tr. 2652-53. As Mr. Woodbury found, even if the SBC proposed conditions to the FCC represent

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[47] See ICC Questions (4) (a) & (b).

[48] Sprint Ex. 2.0 (Woodbury) at 33.

[49] Sprint Ex. 2.0 (Woodbury) at 34.

movement in the right direction, they are just small steps and do not go far enough or offset the anti-competitive harm that is posed by the merger. Mr. Woodbury concludes that one of the problems is in ensuring enforcement of the proposed conditions and ultimately we are still left with the heighten incentives SBC would have to frustrate new competitive entry. Tr. 2659.

Similarly, consumers will be harmed by this merger. As the witnesses stated, by eliminating a major potential competitor, the incentive for Ameritech to reduce its prices is greatly diminished.[50] By disadvantaging rival CLECs, the Applicants will take away CLEC's ability to compete effectively. A competitive market usually leads to lower prices; however, CLECs will not be able to obtain the services they need from SBC in order to provide lower competitive prices. Therefore, customers will not have competitive choices and will be forced to pay the higher monopolistic prices that SBC and Ameritech can afford to charge. Finally, consumers will lose the most powerful potential competitive choice over Ameritech – SBC.

The Commission, likewise, will be harmed. Ameritech has repeatedly challenged this Commission's decisions such as the one regarding reciprocal compensation for Internet Service Providers. Even after Ameritech lost this issue before the ICC and the Federal District Court, Ameritech persisted in litigating the matter with small CLECs in several interconnection proceedings. As a result, the Commission and Staff had to take time to review complaint cases filed against Ameritech.[51] This Commission has struggled with Ameritech's actions to avoid the dictates of the federal Act. It is quite possible that the limited control the ICC can now assert may be totally lost if this merger proceeds. Even the FCC admits that mergers like this one lead to decreased Commission control over companies and their actions. Bell Atlantic-NYNEX Order,

[50] Sprint Ex. 2.0 (Woodbury) at 6.

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In Illinois, Staff's testimony opined that competitors to Ameritech's bundled service offerings could be hampered in the future and that the negative impacts of the proposed merger on competition in the local exchange market may spill over into other markets such as the intraMSA toll market. See ICC Staff Ex.3.01 (Yow) at 10. Thus, rather than seeing an improvement in services, the approval of the merger could cause a decline in the level of competition for certain markets.

Moreover, as ICC staff indicated, it is likely that the Commission's job of regulating Ameritech Illinois will become harder given: (1) that the reduction in the number of independent RBOCs will make it more difficult for the Commission to evaluate Ameritech Illinois' quality of service, cost characteristics, rate levels, innovation efforts, competitive efforts as well as technical and economic feasibility issues; (2) the disturbing evidence of SBC's lack of compliance with state and federal commission requirements; and, (3) SBC's negative attitude towards competition and competitors. Staff's concern is that the merger may encourage more, not less, legal wrangling and provide "an incentive on the part of SBC not to comply with Commission Orders."[52] The analysis of this case demonstrates that the proposed merger will have an adverse impact on the public interest and competition in the local exchange market.

CONCLUSION

21st Century does not discourage the competitive entry into Illinois telecommunications markets of any CLEC, including SBC. The issue, however, is not whether to allow a company

[51] QST Com Inc., ICC Docket No. 98-0603; MegsInet CLEC Inc. ICC Docket No. 98-0747.

such as SBC to conduct business in Illinois. The real question is: in what manner could this Commission encourage fair entry of such a sizable telecommunications incumbent? The concept of "expanding incumbents" is what recent FCC merger analysis considers. The merger will negatively impact the public interest and the relative standard provided under the Illinois Act.

21st Century has forcefully demonstrated the actions, or in-actions, that Ameritech is presently engaged in which attempt to thwart competitive entry in the local market. It is for this Commission to decide whether sufficient conditions can be carved out or whether making SBC come to Illinois as a competitor would be a better strategy.

The evidence demonstrates that this merger will harm Illinois consumers and local exchange competition. The merger will raise barriers to competitive entry far too high for other carriers. Therefore, the question this Commission should answer is whether there exits a less intrusive method that will encourage SBC, just like any other CLEC, to enter the Illinois market without crushing the business plans of smaller carriers and impairing cost-effective services for consumers. Whether this Commission reviews the subject merger under Illinois law, the various FCC merger decisions, or the *Horizontal Merger Guidelines*, the result is the same. The merger of SBC and Ameritech stretches too far the link between fair competition and high concentration of capital to achieve economies of scale and scope. There are questions about the sort of competitor SBC can be in Illinois and whether the Company's litigious nature and candor merit this Commission's approval of this merger. Rather than ensuring more regulatory monitoring work for the ICC, let SBC enter the market as a true competitor. SBC's choice to buy rather than compete should not be the criteria to set the agenda, and the delay of real local exchange

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[52] ICC Staff Ex. 3.01(Yow) at 22.

competition should not be the end result of this Commission's order.

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Respectfully submitted:
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